

Message Text

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TAGS: ETEL, CA
SUBJECT: BORDER TV: SUPREME COURT CASE

REF: OTTAWA 326

1. SUMMARY. SUPREME COURT DEVOTED THREE FULL DAYS
LAST WEEK TO HEARING BUFFALO STATIONS' CASE AGAINST
CRTC RE COMMERCIAL DELETION. COURT RESERVED JUDGMENT
AND DECISION IS NOT EXPECTED BEFORE SPRING AT EARLIEST.
BUFFALO ATTORNEY IS NOT OPTIMISTIC RE LIKELIHOOD OF A
FAVORABLE DECISION. END SUMMARY.

2. EXTENSIVE ORAL ARGUMENT TOOK PLACE JANUARY 26 THROUGH
28 IN SUPREME COURT OF CANADA AS BUFFALO STATIONS
APPEALED 1975 DECISION OF FEDERAL COURT (SEE OTTAWA 250,
JANUARY 22, 1975) UPHOLDING POWER OF CRTC TO ORDER
COMMERCIAL DELETION. FOUR PROVINCES (ONTARIO, QUEBEC,
ALBERTA AND BRITISH COLUMBIA) INTERVENED IN THE CASE
(WHICH HAS MAJOR IMPLICATIONS RE FEDERAL/PROVINCIAL
COMMUNICATIONS JURISDICTIONS) IN SUPPORT OF BUFFALO STATIONS'
POSITION. SASKATCHEWAN, HOWEVER, SUPPORTED THE
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CRTC POSITION. DURATION OF SESSION WAS UNUSUALLY
LONG FOR CANADIAN SUPREME COURT CASE.

3. COUNSEL FOR THE BUFFALO STATIONS ESSENTIALLY
ARGUED (ACCORDING TO TORONTO GLOBE AND MAIL REPORTS --
GENERAL ACCURACY OF WHICH CONFIRMED TO
EMBASSY BY ATTORNEY FOR STATIONS) THAT 1968 BROADCASTING

ACT, TO EXTENT IT AUTHORIZES CRTC TO REGULATE CABLE TV, IS UN-CONSTITUTIONAL AS THIS POWER BELONGS TO THE PROVINCES AND NOT THE FEDERAL GOVERNMENT. LATTER HAS POWER TO REGULATE BROADCASTING BASED ON HERZIAN WAVES, BUT TRANSMISSION BY COAXIAL CABLE IS LOCAL MATTER -- COMPARABLE TO DISTRIBUTION OF INFORMATION AND ENTERTAINMENT BY NEWSPAPERS, FILMS AND STAGE PERFORMANCES -- AND THUS SUBJECT ONLY TO PROVINCIAL JURISDICTION. COUNSEL SUGGESTED CABLE TV SYSTEMS WERE "LOCAL WORKS AND UNDERTAKINGS" OF TYPE SPECIFICALLY RESERVED TO THE PROVINCES UNDER THE BRITISH NORTH AMERICAN ACT. ALLEGED ALSO THAT DELETION REQUIREMENT VIOLATED 1938 INTER-AMERICAN RADIO CONVENTION IN THAT IT INVOLVED INTERFERENCE WITH ANOTHER COUNTRY'S SERVICES. COUNSEL FOR CROWN DEFENDED FEDERAL JURISDICTION, ARGUING TOTALITY OF TRANSMISSION NEED NOT BE BY HERZIAN WAVE TO FALL WITHIN FEDERAL POWER, AND REJECTED RELEVANCE OF 1938 CONVENTION.

3. ONTARIO ARGUMENT BASED UPON EXCLUSIVE PROVINCIAL RIGHTS TO REGULATE CABLE SYSTEMS AS LOCAL ENTERPRISES AND DREW ANALOGY WITH INTRA-PROVINCIAL TRUCKING. QUEBEC ASSERTED FEDERAL POWERS RE CABLE MUST BE LIMITED TO TECHNICAL INTERFERENCE QUESTIONS ONLY AND REJECTED ANY RIGHT OF CRTC TO PROTECT A CANADIAN INDUSTRY. PRESS DID NOT REPORT B.C. AND ALBERTA INTERVENTIONS, BUT GAVE STRONG PLAY TO SASKATCHEWAN WHICH ARGUED IN SUPPORT OF FEDERAL GOVERNMENT THAT A DUAL JURISDICTION EXISTED RESPECTING CABLE. WHILE CABLE SYSTEMS ARE LOCAL UNDERTAKINGS AND SUBJECT TO PROVINCIAL AUTHORITY, LIMITED OFFICIAL USE

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SASKATCHEWAN ASSERTED FEDERAL GOVERNMENT HAD A GENERAL POWER TO RESTRICT IMPORTS OF PRODUCTS COMPETING WITH CANADIAN INDUSTRY AND THEREFORE THE CRTC COULD REQUIRE DELETION. PRESS REPORTS EMPHASIZED QUIZZICAL ATTITUDE OF JUDGES WITH RESPECT TO BUFFALO ARGUMENTS AND THOSE OF SUPPORTING PROVINCES.

4. COMMENT: DOC AND CRTC OFFICIALS HAVE EXPRESSED CONFIDENCE TO TCO THAT FEDERAL ARGUMENTS WERE WELL RECEIVED AND THAT DECISION SUPPORTING CRTC POWERS WOULD EVENTUALLY RESULT. ATTORNEY FOR BUFFALO STATIONS WAS NOT REPEAT NOT OPTIMISTIC RE FAVORABLE OUTCOME FOR HIS SIDE. HE TOLD TCO COURT PROCEEDING WAS EXTREMELY LONG FOR AN APPEALS CASE AND THAT JUDGES WERE VERY "QUARRELSOME" IN DEALING WITH STATIONS AND SUPPORTING PROVINCES. FELT THAT CHIEF JUSTICE LASKIN HAD A PRE-CONCEIVED INTENTION TO SUPPORT FEDERAL POWER.

5. BUFFALO ATTORNEY ALSO SAID BEST GUESS OF HIS

COLLEAGUES WAS THAT DECISION WOULD NOT BE UNANIMOUS. SUPREME COURT CONSIDERED LIKELY TO FIND FOR FEDERAL GOVERNMENT ON BASIC QUESTION OF JURISDICTION, BUT INTERPRETATION OF INTER-AMERICAN RADIO CONVENTION MIGHT BE MORE FAVORABLE TO STATIONS' INTERESTS. STRONGEST HOPE IS THAT THEIR ARGUMENTS (NOT REPORTED IN PRESS) RE STATUTORY CONSTRUCTION -- NAMELY, BROADCASTING ACT DID NOT SPECIFICALLY AUTHORIZE CRTC TO REQUIRE DELETION -- MIGHT SAVE THE DAY. SOURCE ALSO SPECULATED IT WOULD BE SIX MONTHS OR MORE BEFORE A DECISION ISSUED AS SUPREME COURT HAS GRANTED LEAVE TO APPEAL IN PARALLEL QUEBEC CASE (SEE QUEBEC 17 AND 18), AND IT IS POSSIBLE COURT WILL HEAR THAT CASE AND DECIDE TWO QUESTIONS JOINTLY.

6. FINALLY, BUFFALO ATTORNEY NOTED HE WAS NOW ATTEMPTING TO COME TO TERMS WITH ROGERS WHEREBY LATTER WOULD CEASE DELETION (SUBJECT TO CRTC APPROVAL) AND STATIONS WOULD LIMITED OFFICIAL USE

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WITHDRAW CLAIMS FOR DAMAGE. SUCH A SETTLEMENT, IF REACHED, MIGHT RENDER ISSUE BEFORE COURT MOOT, BUT CRTC PROBABLY WOULD NOT APPROVE ROGERS ABANDONMENT OF DELETION UNTIL COURT HAD ACTED.

7. FEAR OF A PROVATE SETTLEMENT WHICH WOULD PROVENT CLEAR SUPREME COURT DECISION AFFIRMING FEDERAL POWER IN THIS AREA, ACCORDING TO AN EXTAFK SOURCE, WAS THE REASON FOR GOC REQUEST FOR USG CONFIDENTIALITY OF ITS DELETION MORATORIUM DECISION. WHETHER BUFFALO STATIONS WILL BE SUCCESSFUL IN DEALING WITH ROGERS AND, IF SO, WHETHER AND HOW COGNIZANCE OF THIS WILL BE TAKEN BY COURT REMAINS TO BE SEEN.
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